IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 784 of 2002
With
CRIMINAL APPEAL No. 30 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMNIK DAMODAR ADHIYA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance in Criminal Appeal No.784 of 2002
MR NIRAV C THAKKAR for the Appellant
MS DS PANDIT, ASSTT PUBLIC PROSECUTOR for the Opponent

Appearance in Criminal appeal No. 30 of 2003

MR NN PRAJAPATI for the Appellant
MS DS PANDIT, ASSTT PUBLIC PROSECUTOR for the Opponent

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 30/07/2007

COMMON ORAL JUDGMENT

1. The appellants of both these appeals have challenged by preferring these two different appeals the legality and validity of the order of conviction

and sentence passed by the learned Special and Additional Sessions Judge (Fast Track Court) Junagadh in Sessions Case No.116 of 2000. Two accused persons were charged for the offence punishable under Section 20(B)(1) of the Narcotic Drugs & Psychotropic Substance Act, 1985 (hereinafter referred as “NDPS Act”). Both the accused, on conviction, are sentenced to undergo rigorous imprisonment for two and half years and to pay fine of Rs.2500/- (Rupees Two Thousand Five Hundred only) each. In the event of failure to pay the amount of fine, both the appellants are asked to undergo rigorous imprisonment for a month.

2. Mr. Nirav Thakkar, learned advocate for the appellant, has made submissions in the matter and Mr. N.N. Prajapati, learned advocate, appearing for the appellant, i.e. Umar Abdulla Sumra, has adopted the arguments advanced by Mr. Thakkar. As it is possible for this Court to deal with the appeals simultaneously and dispose of both these appeals by a common judgment, they are being decided by this judgment.

3. For brevity and convenience, I would like to quote the relevant part of the charge- Exh.1, that was framed against the appellants. Both the appellants, hereinafter, to be referred as “Accused”. The charge framed by the learned Trial Judge is the gist of the case of the prosecution, which says that “On 8.9.2000, at about 19.35 hrs. in the evening, you accused No.1 with an intention to sell ganja were

standing in the circle chowk, near Ota. At that time, you accused No.2 with a view to purchase ganja from accused No.1 went to him and when were actually purchasing ganja, the police intercepted you both and you both were personally searched and during search, the police recovered amount of Rs.242/- alongwith 16 grams of ganja worth Rs.32/- and Rs. 210/- received through such sale and both of you were caught and thereby you both have committed offence punishable under Section 20(B)(2) and Section 22 of the NDPS Act, 1985".

4. Both the appellants have challenged the legality and validity of the judgment on various grounds mentioned in the appeal memo. However, Mr. Thakkar has concentrated his arguments mainly on two points. The first point of argument is that there are material infirmities if the basic case of the prosecution is considered, viz-a-viz nature of evidence ultimately led by the prosecution. Undisputedly, the police had information and on the strength of the information only, the police personnel had kept watch. According to the prosecution, the information was that some transaction was to take place qua the prohibited substance- hemp and when the muddamal for the first time was recovered during search at Circle Chowk, the prohibited substance seized was also identified as hemp, popularly known as 'Bhang' by the police as well as by the panchas and same was also sealed accordingly. However, the evidence led by the

prosecution is that, actually, it was not hemp but it was ganja. It appears that the Forensic Science Laboratory, on analysis, found that the muddamal article received for analysis is ganja and not hemp. Both these substances are materially different then how such infirmity has cropped up is a question and that was required to be explained by the Investigating Officer, mainly the Trap Officer, who had carried out the search and claimed to have sealed the muddamal in presence of panchas on the spot. In such a fact situation, the learned Trial Judge ought not to have placed any reliance on the police evidence, the panchnama carried out of the search and sealing of the muddamal. On one hand, the prosecution says that total 16 grams of prohibited substance was recovered, but, actually, the prosecution ought to have said specifically that 6 grams was found with person 'A' and remaining 10 grams was found in conscious possession of person 'B'. No such specific charge is framed and there is no evidence as to actual passing of some of the prohibited substance from accused No.1 to accused No.2, otherwise the panchas could have visualized the actual handing over and taking over of the prohibited substance as the prosecution claims that they were in the vicinity of the spot of the incident. In a sensitive prosecution, like the prosecution under the NDPS Act, investigating agency is supposed to investigate the crime and put up the papers in the form of final report under Section 173 in the meticulous manner and the Court should expect foolproof evidence keeping in

mind the quantum of punishment provided for defence. So, on merits, the prosecution case ought not to have been held to be a foolproof case against any of these two accused.

5. Second point advanced by learned advocate Mr. Thakkar is that officer, who had arranged for a trap on information, has failed in following foolproof sealing procedure of the prohibited substance allegedly recovered from the accused. By reading the relevant part of the panchnama, Mr. Thakkar has submitted that, in the present case, the muddamal was not sealed affixing slip bearing signature of both the panchas on the packet itself. It is expected that the muddamal article seized is sealed, remains safe and intact and nobody should have any opportunity or scope to play with the muddamal article so seized. It is only possible when the officer after seizure of the muddamal seals prohibited substance with a perfect seal; either his personal seal or seal of the police station, putting the slip signed by both the panchas. In the present case, plain reading of the panchnama itself indicates that the muddamal was sealed by putting the slip inside the parcel that was prepared. So, the slip bearing signature of both the panchas that was made intact by the F.S.L. when the sample had reached for analysis to the authority would not help the prosecution.

6. Even the FSL report and the relevant documents

produced at Exhs. 54 to 57 do not reveal that the sealed parcel that was received by the FSL was having a seal with a slip affixed on the parcel itself. After the seizure, the muddamal was to remain with the police and when the slip was kept inside the packet, it was possible for any person in charge of the muddamal- parcel, including trap officer, to change the muddamal because such officer obviously would have the same seal with them. Even if the seal is also changed, it would not be possible for the panchas to recollect that what type of marks either engraved or embossed were there at the time when the seal was actually affixed. Mr. Thakkar also also drew the attention of the Court that two different plastic bags were found from the parcel received by the FSL. These plastic bags were found torn and with the help of a pin, torn portion was closed. If the muddamal was recovered from two different persons in different quantities, it was safe and necessary to send both the plastic polythene bags separately sealing them, affixing slips with signature of both the panchas on the parcel. Some portion of the slip should be found covered with the slip affixed by the Seizing and sealing authority. In support of this submission, Mr. Thakkar has placed reliance on one judgment reported in **2006 (1) GLH 409** in the case of **Navinkumar Alias Shambhuprasad Alias Bapji Chimanlal Vyas Vs. State of Gujarat**. In para 8 of the judgment, the Division Bench has said that:

“8. ....The correct procedure of sealing

muddamal is enumerated by three decisions of this Court, namely: (1) Chandrakant Nagindas Modi v. State of Gujarat, 1989(I) F.A.C.153; (2) Unreported decision dated August 17, 2001 rendered by the Division Bench comprising B.C.Patel (as he then was) & A.L.Dave,JJ., in Criminal Appeal No.323 of 1996 filed by Jitendra alia Sanjaykumar Surykant Desai against State of Gujarat, and (3) decision dated May 7, 2002 rendered by the Division Bench comprising Kshitij R.Vyas & Ravi Tripathi,JJ in Criminal Appeal No.287 of 1999 filed by Ganpatram Punmaram Vishnoi against State of Gujarat. As per law laid down by this Court, the slips bearing signatures of the panch-witnesses should be affixed on samples and thereafter seals should be applied so that if any attempt is made to tamper with the sample, the slips affixed would get torn. On reappreciation of evidence, this Court is satisfied that correct and fool-proof procedure of sealing was not resorted to by Mr.Vaghela and possibility of tampering with muddamals was not ruled out at all. This deficiency will have to be evaluated in the light of other discrepancies brought on record of the case. The case of the prosecution is that samples of 250 grams of ganja, 250 grams of poppy husk, 20 grams of charas, 649 tablets of madhu-munakka containing psychotropic substance were sent to F.S.L. for detailed analysis. The report of analysis indicates that sample of

> ganja was weighing 225 grams instead of 250 grams, whereas sample of poppy-husk was weighing 236 grams instead of 250 grams and sample of charas was weighing 17.5 grams instead of 20 grams and 653 muddamal tablets, having psychotropic substance, were received by F.S.L. for analysis instead of the fact that total number of tablets seized was 649. This discrepancy is not explained by any of the witnesses examined by the prosecution. This discrepancy has to be viewed in the light of the defective procedure adopted by P.S.I. Mr.Vaghela at the time of sealing muddamal articles. Therefore, it is not satisfactorily explained by the prosecution that the muddamal samples were sealed in such a manner so as to rule out tampering of the same before it reached F.S.L. On this ground also, the appellant is entitled to get benefit of reasonable doubt. On review of evidence led before the trial Court, this Court is of the opinion that it is difficult to sustain conviction of the appellant and the appeal will have to be allowed."

In this cited decision, the police had put the slip signed by panchas inside the parcel as that has happened in the present case. So, it is submitted that this decision would positively help the present appellants. In the same way, another judgment of this Court, in the case of **Jitendra @ Sanjaykumar Suryakant Desai Vs. State of Gujarat** (**Criminal Appeal**

No.323 of 1996, decided on 17.08.2001, Coram: Messrs B.C. Patel and A.L. Dave, JJ.), according to Mr. Thakkar, would help the accused. For sake of brevity and convenience, I would like to quote relevant para 5 of the judgment, where the Division Bench has said that:

> "5. We have taken a close look at the record and proceedings. In our opinion, the contention regarding laxity in following the procedure relating to sealing of the seized contraband articles has some substance. It is very clear from the evidence of the Investigating Officer, P.S.I.-Ramgadhiya (Ex.55), Dy.S.P., A.T.S. Kantilal Modi (Ex.60) and Panch-Pareshbhai Tribhovandas Brahmbhatt (Ex.9) that, after drawing the samples, at the time of sealing the samples as well as the remainder of the contraband seized, the slips containing signatures of the Panch witnesses and the Police Officer were placed inside the bags, thereafter the bags were stitched and wax seals were applied. There is no dispute that the Seal remains in custody of the police. The possibility of tampering with the muddamal at a later stage and then again resealing the same by the Investigating Agency cannot be ruled out. The very purpose behind carrying out the search, taking of sample and sealing in presence of Panch witnesses is to ensure that there is no scope for any mischief in procedure required to be followed. At the

> time of sealing, slips containing signatures of Panch witnesses as well as the Investigating Officer are affixed on the articles seized and a seal is applied over it, so that, in case of any attempt for tampering with the article seized, the seal would be broken or the slip would be torn which would immediately reveal such an attempt. If the slip is put inside as was done here, as discussed earlier,the possibility of tampering cannot be ruled out. Under the circumstances,the procedure followed for sealing in the instant case cannot be said to be proper and free from any possibility of tempering. The procedure, therefore, cannot be said to be beyond the scope of any reasonable doubt and in that event, benefit must go to the accused."

Mr. Thakkar has also placed reliance on another judgment reported in **2007 (2) GLR 1020** in the case of **Sohanlal Kasiram Brahmin and another Vs. State of Gujarat and another**. The Court has said in para 37 that:

> "37. As observed earlier, there is also contradiction with regard to the affixing of seal as the police witnesses have stated that there is only one seal affixed on the sample marked A/1 whereas F.S.L. Report says that there were two seals on the said sample. From the evidence of these police witnesses and F.S.L. Report, it is clearly found that the slips were loosely kept in the cloth bag and it was not

affixed on each of the plastic bag. The report further makes it clear that the proper procedure has not been followed by the raiding party and/or Investigating Agency. Because of the material contradictions between the depositions of the prosecution witnesses regarding the affixing of the seal and the sealing procedure coupled with the serious doubt raised about custody of Muddamal articles, this Court is of the view that there may be a possibility of tampering with the contents of the sample before they were sent to F.S.L. for analysis. When there is possibility of tampering with the contents of the sample, then no reliance can be placed on the expert opinion and the report of the F.S.L. and it cannot be said that the contraband articles were seized from the possession of the accused and that the sample therefrom was taken and that the sample was sent for analysis and that the report of the expert is regarding the same. When it is so, then the report deserves to be discarded in toto. Standing Instructions issued by the Central Government are violated as contradiction is found in the evidence of P.W. 2 & P.W. 3 with regard to the fact of accused signing the slips which were found in the cloth bags containing the samples. In light of these discrepancies, it is very unsafe to sustain the conviction order. Both the accused are arrested in November, 2000. Almost 6 years are about to be over. It is very unfortunate that the appeal could not be heard earlier. Because of the fact

> that this Court has consistently taken the view that when the sealing procedure is not adopted in accordance with the provisions of the Act as well as the guidelines issued by the Central Government and if other contradictions, inconsistencies and infirmities are found, in that case, the conviction cannot be upheld."

For short, according to Mr. Thakkar, because of the defective sealing procedure and the discrepancy of the prohibited substance allegedly found from the accused, both the appeals should be allowed and the conviction should be set aside.

7. Learned Additional Public Prosecutor Ms. Pandit, after going through the judgments relied on by Mr. Thakkar and the relevant part of the muddamal, has fairly accepted as it appears that in the present case, the officer has failed in affixing the slip signed by the panchas on the parcel itself and it was kept inside the parcel prepared, otherwise the panchnama would have stated the things in a different way and manner than it is mentioned in the panchnama Exh.42. The contents of panchnama Exh.42 about placement of the slip signed by the panchas get direct support from the details described in the report Exh.56. The report is FSL report, which clearly states that the slip was found from the parcel otherwise it could have been mentioned that the slip signed by the panchas was intact with the slip on the parcel received. In response to the query raised by the Court, Ms. Pandit, learned APP, submitted that the ratio of the cited decisions would

practically cover the case of the appellants, i.e. the second point of argument. In case of Jivabhai Bhayabhai Khachar Vs. State of Gujarat (Criminal Appeal No.483 of 2002, decided on 24.11.2006), this Court (Coram: C.K. Buch, J.) has said that:

> “15. ..... It emerges from evidence that Police Sub Inspector, Vichhiya Police Station had accompanied with the Deputy Superintendent of Police, Prosecution Witness No.5-Vanrajbhai Maganbhai who is examined at Exh.30. Shri Shaktisinh Zala, P.S.I., who is examined as Prosecution Witness No.4 at Exh.15 has stated that the prohibited substance- poppy straw weighing 800 gms., valued at Rs.160/- was kept in a cloth bag and a slip signed by Panchas was affixed. It was sealed by Police Sub Inspector, Vichhiya Police Station. The Deputy Superintendent of Police has not stated in his examination in chief about the use of the cloth bag. The cross-examination of this witness makes his version doubtful because there was no reason for this Officer to take only one cloth bag of a particular size to carry with them while proceeding to carry out the raid. This infirmity, even if ignored, the oral version of these two witnesses is not in conformity with the contents of Panchnama. Therefore, it can be said that these witnesses do not get corroboration from Panchnama at Exh.11. As contended in the Panchnama when the raiding

party had entered into the house of the accused, the house was searched and in one of the room on the eastern side, tin was lying and it was containing powder of opium poppy (800 gms) and that powder was lying in a plastic bag. The same was put inside the cloth bag brought by the Raiding Party Officer and in that a slip signed by Panchas and Police was also kept and thereafter that cloth bag was wrapped by thread and was sealed by the Police Sub Inspector, Vichhiya Police Station, meaning thereby the slip signed by Panchas and countersigned by Deputy Superintendent of Police was kept inside the cloth bag alongwith the plastic bag and there is no reference of affixing a slip singed by Panchas and countersigned by the Seizing Officer, Deputy Superintendent of Police, with seal which was affixed over the cloth bag. It is contended in Panchnama that one slip was kept inside the cloth bag and the second slip was affixed with seal. So nobody can tamper with the sealed container without tearing apart the slip signed by the Panchas.

16. Keeping of the slip signed by the Panchas in the container has been viewed with doubt by this Court in more than one decisions. I have carefully gone through the decision in case of **Ganpatram Punamram Vishnoi Vs. State of Gujarat in Criminal Appeal No.287 of 1999 decided on 7/5/2002 (Coram: Hon'ble Mr.Justice**

K.R.Vyas and Hon'ble Mr.Justice R.R.Tripathi), as well as, the decision of this Court in case of **Jitendraw @ Sanjaykumar Suryakant Desai Vs. State of Gujarat decided on 17/8/2001 (Coram: Hon'ble Mr.Justice B.C.Patel and Hon'ble Mr.Justice A.L.Dave) in Criminal Appeal No.323 of 1996.** Referring these two decisions, the Division Bench of this Court in case of **Navinkumar Alias Shambhuprasad Alias Bapji Chimanlal Vyas Vs. State of Gujarat reported in 2006 (1) G.L.H. 409** has held that the muddamal samples were not properly sealed as required by law and possibility of tampering of muddamal before reaching F.S.L. not ruled out.

17. As per the law laid down by this Court, the slips bearing signature of Panch Witness should be affixed on the sample and thereafter the slips should be signed so that, if any attempt is made to tamper with the sample, the slips affixed would get torned. On re-appreciation, the Court in case of **Navinkumar Alias Shambhuprasad Alias Bapji Chimanlal (supra)** has found that correct and full proof procedure of sealing was not resorted to by Mr.Vaghela and the possibility of tampering with the muddamal was not ruled out at all. This deficiency will have to be viewed in light of other discrepancy brought on record of the case."

8. In view of the above settled position, the prosecution evidence was required to be evaluated as some of the decisions were not there before the learned Trial Court when he evaluated the evidence led by the prosecution in the case on hand. However, discussing the law and the relevant scheme of the NDPS Act, the learned Trial Judge could have expressed his anxiety and pointed out the apparent infirmities and the defects in the sealing procedure of the prohibited substance. For short, keeping in mind the totality and the aforesaid discussion, the present appeals require to be allowed. The arguments advanced by learned advocate Mr. Thakkar and responded by learned APP Ms Pandit are accepted.

9. For the reasons aforesaid, both the appeals are allowed. Judgment and order dated 12th September, 2002 passed by the learned Special and Additional Sessions Judge (Fast Track Court) Junagadh in Sessions Case No.116 of 2000 is quashed and set aside. Both the appellants are ordered to be acquitted from the charges levelled against them in respect of the offence in question. The amount of fine, if paid, be refunded to both of them on proper identification. The bail bonds, if any, stand discharged. Order accordingly.

(C.K. BUCH, J.)

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